

Message

---

**From:** McGuigan, David [McGuigan.David@epa.gov]  
**Sent:** 6/3/2015 5:48:41 PM  
**To:** Hillary.Miller@maryland.gov  
**Subject:** FW: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

Hillary,

I am forwarding you the analysis done by Mark Zolandz, our CAFO expert. As Mark cites, there is a lot of room for interpretation, and our states have varying language, but I think that at the end of the day, you have to look at the intent of the self-inspection program, which is fairly well laid out in the preamble. Good luck.

David

David B. McGuigan, Ph.D.  
Associate Director  
Office of NPDES Permits and Enforcement  
Water Protection Division  
Tel: 215-814-2158  
Cell: 215-514-9651

---

**From:** Zolandz, Mark  
**Sent:** Wednesday, June 03, 2015 1:37 PM  
**To:** McGuigan, David  
**Subject:** FW: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

David,

Here's my analysis of the litter shed inspection criteria based on our regs and the preamble, as well as the analysis of the other state CAFO permit requirements for these inspections. Also, below is Andy's discussion with the MD AG office.

Thanks,

Mark

---

**From:** Duchovnay, Andrew  
**Sent:** Monday, June 01, 2015 3:23 PM  
**To:** Day, Christopher; Zolandz, Mark  
**Cc:** Trulear, Brian  
**Subject:** RE: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

Thanks Mark, based on the 2003 Preamble I concluded that the weekly inspection requirement did apply to all manure storage/treatment structures.

I spoke with Stephanie, of the MD AGs office and she also concluded that the weekly inspection requirement applies to dry storage facilities as well as wet storage lagoons. She made this conclusion based on the language of the 412 regs.

She is planning to recommend that MD ask the Court to remand that section of the permit to MD so that they can make the changes to require weekly inspections. She said that in the past she told MD CAFO operators to just walk past their manure structures when they make their daily inspections.

---

**From:** Day, Christopher  
**Sent:** Monday, June 01, 2015 3:15 PM  
**To:** Zolandz, Mark  
**Cc:** Duchovnay, Andrew; Trulear, Brian  
**Subject:** RE: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

Wow! Thanks Mark for the great analysis. I did not know the details of the dry vs wet weekly monitoring issue, but agree with your analysis that the plain meaning is that it was intended for wet systems. As to the second issue, their challenge is weak – as you point out, this is not a system with a pipe or even outfalls (except in some cases).

Copying Andy and Brian to share your wisdom.

Chris

---

**From:** Zolandz, Mark  
**Sent:** Monday, June 01, 2015 2:53 PM  
**To:** Day, Christopher  
**Cc:** Sincock, Jennifer; Shenk, Kelly; Blanco-Gonzalez, Joel  
**Subject:** RE: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

MAY CONTAIN DELIBERATIVE MATERIAL: DO NOT RELEASE UNDER FOIA

Chris,

There are two allegations made by the petitioners:

1. MDE's CAFO GP should require weekly inspections of dry poultry litter storage facilities instead of every three months.
2. MDE's CAFO GP should require effluent monitoring to ensure that the permittee is meeting the ELGs and Chesapeake Bay TMDL.

For the first allegation, about MDE's CAFO GP not requiring weekly inspections of dry poultry litter storage facilities, my thought is that it all depends on whether or not the CAFO regulations intended the weekly inspections to focus on ensuring that liquid manure structures do not overflow or breach and cause a discharge. When I read 40 CFR 412.37.a.1.iii, it states that "Weekly inspections of the manure, litter, and process wastewater impoundments; the inspection will note the level in liquid impoundments as indicated by the depth marker in paragraph (a)(2) of this section." My initial take is that the weekly inspections are limited to liquid manure storage structures. The regs state that weekly inspections are required for "manure, litter, and process wastewater impoundments." "Impoundments" is the noun in that clause receiving the weekly inspections, so weekly inspections are limited to impoundments. An impoundment is defined as "a body of water formed by impounding," and impounding is defined as "to collect and confine (water) in or as if in a reservoir." Therefore, when I read that part of the CAFO regs, I read it as applying to liquid manure storage systems only. This is further emphasized by the regs stating that "the inspection will note the level in liquid impoundments as indicated by the depth marker." And the whole point of the CAFO regs is to regulate discharges, which should not occur from a dry manure storage system.

However, looking at the preamble to the 2003 CAFO Rule, the preamble notes that "Weekly inspections ensure that any storm water diversions at the production area, such as roof gutters or any devices that channel storm water to the wastewater and manure storage and containment structure, are free from debris. Daily inspections of the automated systems providing water to the animals ensure they are not leaking or spilling, which by increasing the rate at which process wastewater is generated can lead to discharge of pollutants to surface water. The manure storage or treatment facility must be inspected weekly to ensure structural integrity. For surface and liquid impoundments, the berms must be inspected for leaking, seepage, wind or water erosion, excessive vegetation, unusually low or high liquid levels,

reduced freeboard, depth of the manure and process wastewater in the impoundment as indicated by the depth marker, and other signs of structural weakness. EPA believes these inspections are necessary to ensure proper maintenance of the production area and prevent discharges of manure, litter, and other process wastewater to surface waters." This is not as clear as the regulations themselves because the preamble references "the manure storage or treatment facility," not limiting the weekly inspections to "surface and liquid impoundments" as done in the next sentence. The preamble also references that the goal of the weekly inspections is "to ensure structural integrity." This could apply to the structural integrity of either a liquid impoundment or a dry poultry litter storage structure. However, my greater concern would be with the liquid impoundments and the risks of having a discharge, though this is just a personal opinion.

Looking at the other Region 3 states:

- Delaware uses EPA's language in its regulations that are referenced in its GP ("Weekly inspections and records of the depth of the manure, litter, and process wastewater impoundments; the inspection shall note the level in liquid impoundments as indicated by a depth marker").

- Pennsylvania's GP (PAG-12) is not clear about whether it applies to dry poultry litter storage structures ("Weekly inspections -- Visual inspection of the production area shall be conducted and documented once every week, and after measurable wet weather events. Inspections of the production area shall, at a minimum, include: i. evaluation of the adequacy, stability, and operation of the manure storage facilities and/ or impoundments, noting the level in liquid impoundments as indicated by the depth marker installed in accordance with Part C.I.F of this permit").

- Virginia has not issued a permit to dry poultry operation yet, but their permit template proposes to require weekly inspection of "All waste treatment or storage structures and the associated waste transfer system," where "waste" is defined to mean "manure, poultry waste and process wastewater." Therefore, Virginia is proposing to clearly require weekly inspections of dry poultry litter storage structures.

- West Virginia uses EPA's language in its two poultry permits ("Each week the permittee shall inspect the manure, litter, and process wastewater impoundments; the inspection shall note the level in the wastewater impoundments as indicated by the depth marker as provided for in Section H.1.b below").

So while I disagree with some of the petitioners' arguments and alleged facts, I would agree that the CAFO regulations may leave some room for interpretation since they do not clearly state that dry poultry litter storage facilities can be inspected at a lesser frequency than a liquid impoundment.

For the second allegation about MDE's CAFO GP not requiring effluent monitoring to ensure that the permittee is meeting the ELGs and Chesapeake Bay TMDL, a CAFO is not a factory with one pipe leaving it that can easily be monitored. A CAFO includes multiple barns, buildings, litter sheds, feed storage areas, mortality composting areas, etc. A sampling program would have to be developed facility by facility individually and is not conducive to being implemented through a GP. Large duck CAFOs are the only CAFOs that have a numeric effluent limit in the CAFO regulations. CAFO permits are supposed to be zero-discharge from the production area, so any monitoring program that is implemented would have to demonstrate that there was no discharge. I don't know what the petitioners are envisioning for this effluent sampling plan, but I think Virginia is the only state that is trying to actually implement one for CAFOs (all of the production area drains to a stormwater pond, and the farmer is required to collect a sample once per quarter and visually inspect the sample).

I'm happy to participate in a call to discuss further, and I'm looping Joel in since he has good knowledge of the CAFO regulations as well as the state CAFO permits. I'll be around this week to discuss, but then I'll be out the next two weeks and won't be back until around 6/22.

Thanks,

Mark Zolandz  
U.S. Environmental Protection Agency, Region III  
NPDES Enforcement Branch , Water Protection Division  
1650 Arch Street (3WP42)  
Philadelphia, PA 19103-2029  
Tel: 215-814-2319

---

**From:** Day, Christopher  
**Sent:** Monday, June 01, 2015 11:40 AM  
**To:** Sincock, Jennifer; Shenk, Kelly; Zolandz, Mark  
**Subject:** FW: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

Fyi mostly– but if we are going to be discussing whether the MD GP complies with Bay TMDL/WIP, I may need some help. Can you look over a few pages and send me comments (or agree to participate in meeting)? The allegations are pretty thin and global. You don't need to read the whole thing – lots of mischaracterizations and legal conclusions sprinkled throughout (e.g., the Bay TMDL establishes the WQS –no). But if you could look at pages 13-14, 28-29

---

**From:** Duchovnay, Andrew  
**Sent:** Monday, June 01, 2015 11:13 AM  
**To:** Blanco-Gonzalez, Joel; Day, Christopher; Trulear, Brian; McGuigan, David  
**Cc:** Field, Stephen  
**Subject:** FW: In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

Attached is the brief filed by the Petitioners in the challenge to Md's GP for CAFOs. They raise some interesting points, such as a criticism that the GP does not require weekly inspections of dry manure storage impoundments. More importantly, however, they argue that the GP does not comply with the Bay TMDL and the state's WIP.

I would like to schedule a meeting to discuss the TMDL arguments.

Andy

**From:** Stephanie Cobb Williams -MDE- [<mailto:stephaniecobb.williams@maryland.gov>]  
**Sent:** Monday, June 01, 2015 10:09 AM  
**To:** Duchovnay, Andrew  
**Subject:** In the Matter of Food & Water Watch, et al.- Petitioners' Memorandum

Hi Andy,

I have attached the Petitioners' supporting memorandum. Essentially, they argue that MDE's AFO GDP is not consistent with CWA requirements. Let me know if you are able to get hold of 39 FR 5704 (Feb. 14, 1974). Thanks.

Stephanie Cobb Williams  
Assistant Attorney General  
Maryland Department of the Environment  
1800 Washington Boulevard  
Suite 6048  
Baltimore, Maryland 21230  
(410) 537-3040